Supreme Court, U.S.
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No. 03-42

IN THE

Supreme Court of the United States

OCTOBER TERM, 2003

JENNIFER LAND,

Petitioner,

—v.—

TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

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August 7, 2003

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List of Parties and Rule 29.6 Statement

Petitioner seeks review of an order of the Supreme Court of Texas denying her petition for writ of mandamus. Respondent MBNA America Bank, N.A., one of the defendants in this case, was the real party in interest below.

The parent company of respondent MBNA America Bank, N.A. is MBNA Corporation. No other publicly held company owns 10% or more of the stock of respondent.

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Respondent MBNA America Bank, N.A., the real party in interest below, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Supreme Court of Texas's denial of petitioner's petition for writ of mandamus.

Statement of the Case

Petitioner was the holder of a credit card issued by respondent. She commenced this lawsuit in Texas state court in July 2001, alleging that respondent violated her right to privacy by transferring information about her account to a collection agency.

Before this lawsuit was filed, respondent amended the credit card agreement applicable to petitioner's account to add an arbitration clause. That clause provides that any claim related to petitioner's account must be resolved by binding arbitration conducted by the National Arbitration Forum ("NAF").

In September 2001, respondent moved to compel arbitration of petitioner's claim. After ten months of discovery regarding respondent's arbitration clause, the Texas trial

court granted respondent's motion and ordered that the dispute be arbitrated. Pet. App. at 4-5. Both the Texas Court of Appeals and the Texas Supreme Court denied petitioner's petition for writ of mandamus seeking review of the trial court's order. *Id.* at 1-2, 6.

Reasons Why the Petition Should Be Denied

1. Petitioner does not contend that there is a conflict among the lower courts that this Court should resolve. More specifically, petitioner does not argue that the Supreme Court of Texas "decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." SUP. CT. R. 10(b). Absent such a conflict, there is no reason to grant certiorari here.

2. There is no conflict between the decision below and this Court's precedents. Petitioner incorrectly asserts that the Texas Supreme Court's decision in this case is contrary to *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968). In *Commonwealth Coatings*, one member of a three-person arbitration panel selected to resolve a dispute failed to disclose a business relationship with one of the parties. 393 U.S. at 146. In ruling that the arbitration award should be vacated, this Court held that arbitrators should "disclose to the parties any dealings that might create an impression of possible bias." *Id.* at 149. Here, by contrast, petitioner does not contend that the individual arbitrators selected to conduct the arbitration failed to disclose dealings with respondent that might create an appearance of partiality. Nor could she given that those arbitrators have not yet even been selected.

Petitioner instead claims that the NAF, the organization responsible for administering the arbitration, is partial to financial institutions generally. That claim is without merit and is distinguishable from the claim in *Commonwealth Coatings*. As one court recently observed:

> [T]he NAF does not conduct the arbitration itself, but rather appoints independent third-party arbitrators who actually conduct the proceedings; and those arbitrators may not be officers or directors of the NAF, they must take an oath to be "independent and neutral" and they must disclose any circumstances that might constitute a conflict of interest.

Bank One, N.A. v. *Coates*, 125 F. Supp. 2d 819, 835-36 (S.D. Miss. 2001). Rule 23(B) of the NAF Code of Procedure requires arbitrators to disclose any "circumstances that create a conflict of interest or cause an Arbitrator to be unfair or biased," thus satisfying the requirement of *Commonwealth Coatings*. This Court also has rejected similar attacks on arbitration based on speculation that arbitration panels will be biased. *See Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-32 (1991); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985).

3. There are no published opinions in this case, and none of the courts below expressly addressed the questions presented by this petition. The Texas courts instead disposed of this matter through short unpublished orders without discussing the issues petitioner now seeks to raise in this Court. *See* Pet. App. at 1-6. This is reason alone to deny certiorari.

4. Petitioner's argument that respondent's arbitration clause is unconscionable is fact-bound, devoid of support in the case law, and based on numerous gross misstatements of fact. Petitioner contends that the arbitration provision is unconscionable "because of the unfair manner in which it was purportedly procured" and because the NAF "has an inherent bias against consumer claims." Pet. at 12. Petitioner cites no authority in support of that contention, which is dependent upon the specific factual assertions with no support in the record in this case.

Contrary to petitioner's contention, numerous courts have enforced, over similar objections, the very same arbitration provision at issue in this case. *See, e.g., Lloyd* v. *MBNA Am. Bank, N.A.*, No. Civ. A. 00-109-SLR, 2001 WL 194300 (D. Del. Feb. 22, 2001), *aff'd*, 2002 WL 21932 (3d Cir. Jan. 7, 2002); *Joseph* v. *MBNA Am. Bank, N.A.*, 775 N.E.2d 550 (Ohio Ct. App. 2002); *Edelist* v. *MBNA Am. Bank, N.A.*, 790 A.2d 1249 (Del. Super. Ct. 2001). And courts likewise have rejected similar claims that the NAF is biased in favor of banking institutions. *See, e.g., Beneficial Nat'l Bank, U.S.A.* v. *Payton*, 214 F. Supp. 2d 679, 690-91 (S.D. Miss. 2001); *Bank One*, 125 F. Supp. 2d at 835-36; *Marsh* v. *First USA Bank, N.A.*, 103 F. Supp. 2d 909, 924-26 (N.D. Tex. 2000). Petitioner does not discuss any of these cases in her petition.

5. There is no reason for this Court to review the determination of the Texas appellate courts that the trial court did not clearly abuse its broad discretion in compelling arbitration. Respondent amended petitioner's credit card agreement to add an arbitration clause in accordance with Delaware law, *see* DEL. CODE ANN. tit. 5, § 952(a), the law that governs her agreement with respondent. And there is no dispute that petitioner's claim in this case falls within the scope of that arbitration clause. Consistent with the case law cited above, the trial court properly granted respondent's motion to compel arbitration. Under Texas law, that decision was reviewed on appeal by petition for writ of mandamus for clear abuse of discretion. *See CLR Ltd.* v. *Link*, 925 S.W.2d 591, 596 (Tex. 1996). The Texas appellate courts concluded that petitioner failed to show that "the trial judge clearly abused his discretion in compelling arbitration." Pet. App. at 1. That decision does not warrant review by that Court.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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